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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TYLER HARDY, Individually and On Behalf of All Others Similarly Situated,	Case No.: 3:22-cv-02090-JSC
Plaintiff,	
vs.	
EMBARK TECHNOLOGY, INC. f/k/a NORTHERN GENESIS ACQUISITION CORP. II, IAN ROBERTSON, KEN MANGET, ALEX RODRIGUES, and RICHARD HAWWA,	NOTICE OF MOTION AND MOTION OF TYLER HARDY FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT <u>CLASS ACTION</u>
Defendants.	Date: July 7, 2022
	Time: 9:00 a.m.
	Judge: Hon. Jacqueline Scott Corley
	Courtroom: 8—19th Floor

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that on July 7, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard, before the Honorable Jacqueline Scott Corley, in Courtroom 8, 19th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Tyler Hardy (“Hardy”) will and hereby does respectfully move this Court, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), for the entry of an Order: (1) appointing Hardy as Lead Plaintiff on behalf of all purchasers of Embark Technology, Inc. f/k/a Northern Genesis Acquisition Corp. II (“Embark” or the “Company”) securities between January 12, 2021 and January 5, 2022, inclusive (the “Class Period”) (the “Class”); and (2) approving Hardy’s selection of Pomerantz LLP (“Pomerantz”) as Lead Counsel for the Class.

SUMMARY OF ARGUMENT

To the extent that this motion seeks appointment of Hardy as Lead Plaintiff, this motion is made on the grounds that Hardy is the “most adequate plaintiff” to lead the Class within the meaning of the PSLRA and that the PSLRA therefore mandates Hardy’s appointment as Lead Plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). Hardy believes that he is entitled to a rebuttable presumption favoring his appointment, since he has the “largest financial interest” in the relief sought by the Class in the above-captioned action (the “Action”) by virtue of, *inter alia*, his losses of approximately \$953, which were suffered as a result of Defendants’ wrongful conduct as alleged in the Action. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii); *see also Lax v. First Merchants Acceptance Corp.*, No. 97 C 2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 6, 1997) (determining financial interest by (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class period; and (4) the approximate losses suffered); *Nicolow v. Hewlett Packard Co.*, No. 12-05980 CRB, 2013 WL 792642, at *4 (N.D. Cal. Mar. 4, 2013) (“District courts commonly refer to the four-factor [*Lax*] test, which considers (1) total shares purchased, (2) net shares purchased, (3)

1 net funds expended, and (4) approximate losses suffered.”); *City of Royal Oak Ret. Sys. v. Juniper*
2 *Networks, Inc.*, No. 5:11-CV-04003-LHK, 2012 WL 78780, at *4 (N.D. Cal. Jan. 9, 2012) (same);
3 *Knox v. Yingli Green Energy Holding Co.*, 136 F. Supp. 3d 1159, 1163 (C.D. Cal. 2015) (same).
4 Of the *Lax* factors, courts in this Circuit tend to emphasize approximate loss in assessing a lead
5 plaintiff movant’s financial interest within the meaning of the PSLRA. *See, e.g., Nicolow*, 2013
6 WL 792642, at *4; *Knox*, 135 F. Supp. 3d. at 1163. As the movant, to his knowledge, with the
7 largest financial interest in the Action, Hardy believes he is presumptively the most adequate lead
8 plaintiff within the meaning of the PSLRA.

Hardy also satisfies the requirements of Federal Rule of Civil Procedure 23 (“Rule 23”) because his claims are typical of the claims of other putative Class members and because he will fairly and adequately represent their interests.

In addition, the PSLRA vests authority in the Lead Plaintiff to select and retain Lead Counsel, subject to the approval of the Court. Hardy's choice of counsel, Pomerantz, has the skill, knowledge, expertise, resources, and experience that will enable the firm to prosecute the Action effectively and expeditiously under Hardy's direction.

This motion is supported by the memorandum of points and authorities submitted herewith, the Declaration of Jennifer Pafiti, Esq. in Support of Motion (“Pafiti Decl.”), and all exhibits thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Pursuant to the PSLRA, the Court is to appoint as Lead Plaintiff the movant that is shown to be the “most adequate plaintiff.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The PSLRA creates a rebuttable presumption that the “most adequate plaintiff” is the one that possess the “largest financial interest” in the outcome of the litigation and that satisfies the requirements of Rule 23. *Id.* Hardy believes that he should benefit from a rebuttable presumption arising from his having the largest financial interest in this litigation. Hardy purchased 224 shares of Embark securities

1 during the Class Period, expended \$2,012 on his purchases, retained all of his shares of Embark
 2 securities, and, as a result of the disclosures revealing the misrepresentations and/or omissions
 3 during the Class Period, incurred losses of approximately \$953 in connection with his purchases
 4 of Embark securities. *See* Pafiti Decl., Exhibit (“Ex.”) A.

5 Beyond his significant financial interest, Hardy also meets the applicable requirements of
 6 Rule 23 because his claims are typical of absent Class members and because he will fairly and
 7 adequately represent the interests of the Class.

8 To fulfill his responsibilities as Lead Plaintiff and vigorously prosecute the Action on
 9 behalf of the Class, Hardy has selected Pomerantz as Lead Counsel for the Class. Pomerantz is a
 10 nationally-recognized securities class action firm that has recovered billions of dollars on behalf
 11 of defrauded investors. In 2018 alone, Pomerantz secured a recovery of \$3 billion on behalf of
 12 investors in the securities of Petrobras, the fifth largest class action settlement ever achieved in
 13 the United States (“U.S.”), as well as an \$80 million recovery on behalf of investors in Yahoo!
 14 securities. Based in New York, Pomerantz has offices in Chicago, Los Angeles, and Paris, France.
 15

16 Based on his being the “most adequate plaintiff,” his significant financial interest, his
 17 satisfaction of Rule 23 requirements, and his commitment to overseeing the Action, Hardy
 18 respectfully requests that the Court enter an order appointing him as Lead Plaintiff for the Class
 19 and approving Pomerantz as Lead Counsel for the Class.

20 **II. STATEMENT OF FACTS**

21 As alleged in the Complaint of the Action, Embark develops self-driving software
 22 solutions for the trucking industry in the U.S. The Company was originally a special purpose
 23 acquisition company, also called a blank-check company, which is a development stage company
 24 that has no specific business plan or purpose or has indicated its business plan is to engage in a
 25 merger or acquisition with an unidentified company or companies, other entity, or person.

26 On November 10, 2021, the Company consummated a merger transaction with Embark
 27 Trucks Inc., a Delaware corporation (“Legacy Embark”), whereby, among other things, the
 28

1 Company changed its name from “Northern Genesis Acquisition Corp. II” to “Embark
 2 Technology, Inc.” (the “Business Combination”).

3 Throughout the Class Period, Defendants made materially false and misleading statements
 4 regarding the Company’s business, operations, and compliance policies. Specifically, Defendants
 5 made false and/or misleading statements and/or failed to disclose that: (i) the Company had
 6 performed inadequate due diligence into Legacy Embark; (ii) Legacy Embark and the Company
 7 following the Business Combination held no patents and an insignificant amount of test trucks;
 8 (iii) accordingly, the Company had overstated its operational and technological capabilities; (iv)
 9 as a result of all the foregoing, the Company had overstated the business and financial prospects
 10 of the Company post-Business Combination; and (v) as a result, the Company’s public statements
 11 were materially false and misleading at all relevant times.

12 On January 6, 2022, The Bear Cave published a short report entitled “Problems at Embark
 13 Technology (EMBK)” (the “Bear Cave Report”). The Bear Cave Report alleged, among other
 14 issues, “that Embark appears to lack true economic substance” and that its “current evaluation
 15 appears to be based on puffery rather than actual substance”, noting that “[t]he company holds no
 16 patents, has only a dozen or so test trucks, and may be more bark than bite.”

17 On this news, Embark’s stock price fell \$1.37 per share, or 16.75%, to close at \$6.81 per
 18 share on January 6, 2022.
 19

20 As a result of Defendants’ wrongful acts and omissions, and the precipitous decline in the
 21 market value of the Company’s securities, the Plaintiff in the Action and other Class members
 22 have suffered significant losses and damages.

23 **III. ARGUMENT**

24 **A. HARDY SHOULD BE APPOINTED LEAD PLAINTIFF**

25 Motions by proposed lead plaintiffs must be filed within 60 days of the publication of
 26 notice of the action, which in this case was published on April 1, 2022 (*see* Pafiti Decl., Ex. B).
 27 *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). The PSLRA directs courts to consider any such motion by
 28

1 the later of (i) 90 days after the date of publication, or (ii) as soon as practicable after the Court
 2 decides any pending motion to consolidate. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i)-(ii). Hardy's
 3 instant motion is thus timely and must be considered.

4 When faced with competing lead plaintiff motions, under 15 U.S.C. § 78u-4(a)(3)(B), the
 5 Court "shall appoint as lead plaintiff the member or members of the purported class that the court
 6 determines to be the most capable of adequately representing the interests of class members
 7 (hereinafter ... the 'most adequate plaintiff')." *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). Hardy is the
 8 "most adequate plaintiff" within the meaning of the PSLRA and should therefore be appointed as
 9 Lead Plaintiff.

10 To guide this determination, the PSLRA creates a rebuttable presumption that the "most
 11 adequate plaintiff" "is the person or group of persons that" (i) either filed the complaint or made
 12 a motion for appointment as lead plaintiff; (ii) "in the determination of the court, has the largest
 13 financial interest in the relief sought by the class"; and (iii) otherwise satisfies the requirements
 14 of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa)-(cc). As set forth below, Hardy satisfies
 15 all three of these criteria and thus believes that he is entitled to the rebuttable presumption that he
 16 is the most adequate plaintiff within the meaning of the PSLRA. Specifically, Hardy is willing
 17 to serve as Lead Plaintiff, has the largest financial interest in the Action to his knowledge, and
 18 otherwise strongly satisfies the requirements of Rule 23.

19 For all these reasons, as set forth in greater detail below, Hardy respectfully urges the
 20 Court to appoint him to serve as Lead Plaintiff overseeing the Action.
 21

22 **1. Hardy Is Willing to Serve as Class Representative**

23 On April 1, 2022, Pomerantz, counsel for the plaintiff in the Action, caused a notice to be
 24 published over *Globe Newswire* pursuant to Section 21D(a)(3)(A)(i) of the PSLRA (the "PSLRA
 25 Notice"), which announced that a securities class action had been filed against Defendants, and
 26 which advised investors in Embark securities that they had until May 31, 202—*i.e.*, 60 days—file a
 27 motion to be appointed as lead plaintiff. *See* Pafiti Decl., Ex. B.
 28

1 Hardy has filed the instant motion pursuant to that Notice, and has attached a signed
 2 Certification attesting to his willingness to serve as a representative for the Class and to provide
 3 testimony at deposition and trial, if necessary. *See* Pafiti Decl., Ex. C. Under the PSLRA, Hardy's
 4 actions were timely and legally sufficient. Accordingly, Hardy readily satisfies the first
 5 requirement to serve as Lead Plaintiff of the Class.

6 **2. Hardy Is the Most Adequate Plaintiff Within the Meaning of the**
 7 **PSLRA**

8 When faced with competing lead plaintiff motions, under 15 U.S.C. § 78u-4(a)(3)(B), the
 9 Court "shall appoint as lead plaintiff the member or members of the purported class that the court
 10 determines to be the most capable of adequately representing the interests of class members
 11 (hereinafter ... the 'most adequate plaintiff')." *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). Hardy is the
 12 "most adequate plaintiff" within the meaning of the PSLRA and should therefore be appointed as
 13 Lead Plaintiff.

14 **a. Hardy Has the Largest Financial Interest in the Action**

15 The PSLRA requires a court to adopt a rebuttable presumption that "the most adequate
 16 plaintiff . . . is the person or group of persons that . . . in the determination of the court, has the
 17 largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii). To
 18 the best of his knowledge, Hardy has the largest financial interest of any Embark investor or
 19 investor group seeking to serve as Lead Plaintiff based on the four factors articulated in the
 20 seminal case *Lax v. First Merchants Acceptance Corp.*: (1) the number of shares purchased; (2)
 21 the number of net shares purchased (also referred to as "retained shares"); (3) the total net funds
 22 expended; and (4) the approximate losses suffered. 1997 WL 461036, at *5. In accord with
 23 courts nationwide, these so-called *Lax* factors have been adopted by courts in the Ninth Circuit,
 24 including in this District. *See, e.g., Nicolow*, 2013 WL 792642, at *4 ("District courts commonly
 25 refer to the four-factor [*Lax*] test, which considers (1) total shares purchased, (2) net shares
 26 purchased, (3) net funds expended, and (4) approximate losses suffered."); *City of Royal Oak Ret.*
 27

1 Sys., 2012 WL 78780, at *4 (same); *Knox*, 136 F. Supp. 3d at 1163 (same). Of the *Lax* factors,
2 courts in this Circuit tend to emphasize approximate loss in assessing a lead plaintiff movant's
3 financial interest within the meaning of the PSLRA. *See, e.g.*, *Nicolow*, 2013 WL 792642, at *4;
4 *Knox*, 135 F. Supp. 3d. at 1163.

During the Class Period, Hardy: (1) purchased 224 shares of Embark securities; (2) expended \$2,012 on his purchases of Embark securities; (3) retained all of his shares of Embark securities; and (4) as a result of the disclosures revealing the misrepresentations and/or omissions during the Class Period, incurred losses of approximately \$953 in connection with his purchases of Embark securities. *See* Pafiti Decl., Ex. A. Thus, under the *Lax* factors, Hardy believes that he has the largest financial interest among any potential lead plaintiff movants in the Action, thereby entitling Hardy to a rebuttable presumption that he is the “most adequate plaintiff” within the PSLRA’s meaning (15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb)), given that he also satisfies the requirements of Rule 23.

b. Hardy Otherwise Satisfies the Requirements of Rule 23

For a lead plaintiff movant to secure the PSLRA’s rebuttable presumption that the movant is the “most adequate plaintiff,” the movant must also demonstrate that it “otherwise satisfies the requirements of Rule 23.” See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). A *prima facie* showing suffices for this determination. *Hessefort v. Super Micro Comput., Inc.*, 317 F. Supp. 3d 1056, 1060-01 (N.D. Cal. 2018); *Tai Jan Bao v. SolarCity Corp.*, No. 14-CV-01435-BLF, 2014 WL 3945879, at *3 (N.D. Cal. Aug. 11, 2014). “This showing need not be as thorough as what would be required on a class certification motion and only needs to satisfy typicality and adequacy.” *In re Solar City Corp. Sec. Litig.*, No. 16-CV-04686-LHK, 2017 WL 363274, at *5 (N.D. Cal. Jan. 25, 2017). Hardy readily passes muster.

25 Rule 23(a) provides that a class action may proceed if the following four requirements are
26 satisfied:

(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the

1 representative parties are typical of the claims or defenses of the class; and (4) the
 2 representative parties will fairly and adequately protect the interests of the class.

3 Fed. R. Civ. P. 23(a). Rule 23(b)(3) adds that common questions must predominate over any
 4 questions affecting only individual class members and that a class action must be superior to other
 5 available methods for fairly and efficiently adjudicating the case. *See* Fed. R. Civ. P. 23(b)(3).
 6 Here, the Complaint in the Action pleads Rule 23(a)(1) numerosity (*see* Dkt. No. 1 ¶ 45), Rule
 7 23(a)(2) common questions (*see id.* ¶ 48), and Rule 23(b)(3) predominance (*see id.*) and
 8 superiority (*see id.* ¶ 49) in a manner common to all lead plaintiff candidates. The sufficiency of
 9 these allegations is not upset by any facts uniquely concerning Hardy.

10 Hardy satisfies the threshold for Rule 23(a)(3) typicality. “The test of typicality ‘is
 11 whether other members have the same or similar injury, whether the action is based on conduct
 12 which is not unique to the named plaintiffs, and whether other class members have been injured
 13 by the same course of conduct.’” *Richardson v. TVIA, Inc.*, No. C 06 06304 RMW, 2007 WL
 14 1129344, at *4 (N.D. Cal. Apr. 16, 2007) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497,
 15 508 (9th Cir. 1992)). Hardy’s claims are typical of those of the Class members. Like all Class
 16 members, Hardy alleges that: (1) Defendants violated the Exchange Act by making false or
 17 misleading statements of material facts and/or by omitting to disclose material facts concerning
 18 Embark; (2) Hardy and the Class members purchased Embark securities during the Class Period
 19 at prices artificially inflated by Defendants’ misrepresentations or omissions and were damaged
 20 upon the disclosure of those misrepresentations and/or omissions; and (3) Hardy and the Class
 21 members were damaged upon the revelation of Defendants’ alleged misrepresentations or
 22 omissions through corrective disclosures that drove Embark’s share price downward. These
 23 shared claims, which are based on the same legal theories and arise from the same underlying
 24 facts and course of conduct, demonstrate Hardy’s typicality under Rule 23(a)(3).

25 Hardy also satisfies the Rule 23(a)(4) adequacy requirement. In determining whether that
 26 requirement is met, courts in the Ninth Circuit consider whether “the representative plaintiffs and
 27 their counsel have any conflicts of interest with other class members” and ask “will the
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representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?"

Staton v. Boeing Co., 327 F.3d 938, 957 (9th Cir. 2003) (citations omitted). Here, Hardy has submitted a Certification executed by him declaring his commitment to protect the interests of the Class. *See* Pafiti Decl., Ex. C. Hardy has no conflicts of interest or antagonism with the Class of Embark investors he seeks to represent. Hardy's significant losses from his purchases of Embark securities during the Class Period demonstrate that he has a sufficient interest in the outcome of this litigation that aligns with the interests of Class members.

Indeed, Hardy has already demonstrated his ability to pursue securities claims through his choice of counsel, Pomerantz. Pomerantz is one of the nation's leading plaintiff-side securities litigation firms, as discussed in greater detail in Section III.B., *infra*. Hardy's and Pomerantz's willingness and ability to zealously litigate the claims in the Action on behalf of the Class cannot reasonably be questioned.

13 Further demonstrating his adequacy, Hardy has submitted a Declaration attesting to, *inter*
14 *alia*, his background, his investing experience, his understanding of the responsibilities of a Lead
15 Plaintiff pursuant to the PSLRA, his decision to seek appointment as Lead Plaintiff, and the steps
16 that he is prepared to take to prosecute this litigation on behalf of the Class. *See* Pafiti Decl., Ex.
17 D.

B. LEAD PLAINTIFF'S SELECTION OF COUNSEL SHOULD BE APPROVED

21 The PSLRA vests authority in the Lead Plaintiff to select and retain Lead Counsel, subject
22 to the approval of the Court. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v); *Osher v. Guess?, Inc.*, No. CV01-
23 00871LGB(RNBX), 2001 WL 861694, at *4 (C.D. Cal. Apr. 26, 2001). The Court should not
24 interfere with the Lead Plaintiff’s selection unless it is necessary to do so to “protect the interests
25 of the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

26 Hardy has selected Pomerantz to serve as Lead Counsel for the Class. Pomerantz is a
27 premier firm, highly experienced in the areas of securities litigation and class action lawsuits,

which has successfully prosecuted numerous such actions on behalf of investors over its 80-plus year history, as detailed in its firm resume. *See* Pafiti Decl., Ex. E. Pomerantz recently secured a recovery of \$3 billion on behalf of investors in the securities of Petróleo Brasileiro S.A. — Petrobras, the largest class action settlement in a decade and the largest settlement ever in a class action involving a foreign issuer. *See id.* Petrobras is part of a long line of record-setting recoveries led by Pomerantz, including the \$225 million settlement in *In re Comverse Technology, Inc. Securities Litigation*, No. 06-CV-1825 (E.D.N.Y.), in June 2010. *Id.* Most recently, Pomerantz announced as Lead Counsel on behalf of a class of Fiat Chrysler Automobiles N.V. investors that it has reached a \$110 million settlement with the company. *See id.*

As a result of its extensive experience in similar litigation, Hardy's choice of counsel, Pomerantz, has the skill, knowledge, expertise, resources, and experience that will enable the firm to prosecute the Action effectively and expeditiously. The Court may be assured that by approving Hardy's selection of Pomerantz as Lead Counsel, the Class members will receive the best legal representation available. Thus, Hardy respectfully urges the Court to appoint Pomerantz to serve as Lead Counsel.

IV. CONCLUSION

For the foregoing reasons, Hardy respectfully requests that the Court issue an Order: (1) appointing Hardy as Lead Plaintiff for the Class; and (2) approving Hardy's selection of Pomerantz as Lead Counsel for the Class.

Dated: May 31, 2022

Respectfully submitted,

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14 *and Proposed Lead Counsel for the Class*

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PROOF OF SERVICE

I hereby certify that on May 31, 2022, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Jennifer Pafiti
Jennifer Pafiti